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No. 660

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In the Supreme Court of the United States

OCTOBER TERM, 1967

BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT NO. 1, TOWNS OF EAST GREENBUSH, NASSAU, SCHODACH, SAND LAKE AND NORTH GREENBUSH, RENSSELAER COUNTY AND CHATHAM, COLUMBIA COUNTY; AND BOARD OF EDUCATION OF UNION FREE SCHOOL DISTRICT NO. 3, TOWNS OF NORTH HEMPSTEAD AND OYSTER BAY, NASSAU COUNTY, NEW YORK, APPELLANTS

v.

JAMES E. ALLEN, JR., AS COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK, APPELLEE, AND MICHAEL ROCK, ANTHONY DWILESKI, PETER GIRZONE, DOREEN BEAUDIN, CHARLES HAIGH, AND BARBARA BRENNAN, INTERVENOR-APPELLEES

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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INDEX

	Page
Opinions below	1
Jurisdiction	2
Constitutional and statutory provisions involved	2
Question presented	2
Interest of the United States	2
Statement of the case	4
Summary of argument	6
Argument	7
I. Textbook aid to private as well as public school pupils is in furtherance of a valid, secular legislative purpose	8
II. The legislative decision to lend secular textbooks to students attending all accredited schools, including sectarian schools, permissibly accommodates valid state objectives with the values protected by the Establishment, Free Exercise, and Equal Protection Clauses	12
A. Neither the purpose nor the primary effect of the New York Textbook Loan Statute is the advancement of religion	14
B. A consideration of the alternatives to New York's program confirms the conclusion that the State has made a reasonable and constitutionally permissible choice	23
III. No question of violation of the Free Exercise Clause is raised by this case	28
Conclusion	30

CITATIONS

Cases:

Abington School Dist. v. *Schempp*, 374 U.S. 203 12, 14, 16, 28
Braunfeld v. *Brown*, 366 U.S. 599 13, 14
Cochran v. *Board of Education*, 281 U.S. 370 10
Doremus v. *Board of Education*, 342 U.S. 429 5

295-858—68——1

Cases—Continued Page

Engel v. *Vitale*, 370 U.S. 421 ..... 12, 28
Epperson v. *State*, 242 Ark. 922, 416 S.W. 2d 322 27
Everson v. *Board of Education*, 330 U.S. 1 ..... 5, 8, 12, 13, 14, 15, 18, 19, 24, 25, 26
Gallagher v. *Crown Kosher Super Market, Inc.*, 366 U.S. 617 13
Griswold v. *Connecticut*, 381 U.S. 479 24
Judd v. *Board of Education*, 278 N.Y. 200 5
Kedroff v. *St. Nicholas Cathedral*, 344 U.S. 94 17
Kreshik v. *St. Nicholas Cathedral*, 363 U.S. 190 17
McCollum v. *Board of Education*, 333 U.S. 203 8
McGowan v. *Maryland*, 366 U.S. 420 ..... 13, 14, 16, 18, 24, 30
Murdock v. *Pennsylvania*, 319 U.S. 105 26
Pierce v. *Society of Sisters*, 268 U.S. 510 ..... 24, 26
Reitman v. *Mulkey*, 387 U.S. 369 16
Sherbert v. *Verner*, 374 U.S. 398 26
Thorpe v. *Housing Authority*, 386 U.S. 670 24
Torcaso v. *Watkins*, 367 U.S. 488 ..... 14, 17, 19, 28
Two Guys from Harrison-Allentown, Inc. v. *McGinley*, 366 U.S. 582 13
Watson v. *Jones*, 13 Wall. 679 17
Zorach v. *Clauson*, 343 U.S. 306 ..... 13, 25, 28

Constitution and Statutes:

United States Constitution:
Establishment Clause 7, 12, 13, 14, 18, 22
First Amendment 2, 5, 12, 25, 26, 28, 29
Free Exercise Clause 7, 12, 13, 28
Elementary and Secondary Education Act of 1965:
Title I, 20 U.S.C. 241a *et seq* 2
Sec. 421 3
Sec. 441 3
Sec. 464 3
Sec. 481 3
Sec. 511 3
Sec. 511(a) 3
Title II, 20 U.S.C. (Supp. II) 821 *et seq* 3
Higher Education Facilities Act of 1963, The, 20 U.S.C. 701 *et seq.* 4
National Defense Education Act of 1958, Sec. 101, 72 Stat. 1581 9
National School Lunch Act, 42 U.S.C. 1751 *et seq.* 3, 18

Constitution and Statutes—Continued Page

38 U.S.C. 1601 ---- 4
Laws of New York 1965, ch. 320, sec. 1 ---- 9
McKinney's 1965 Session Laws ---- 10, 20
New York Education Law, McKinney's Consolidated Laws of New York:
Sec. 306 ---- 5
Sec. 701 ---- 4, 6
Sec. 701.3 ---- 2, 4, 5
Sec. 1706 ---- 5
Sec. 3204 ---- 11
Sec. 3204.3a (1967 Cum. Ann. Pocket Pt.) ---- 11
Sec. 3205 ---- 11
New York Textbook Law, McKinney's Laws of New York, 1965 ---- 9, 10, 11, 14, 22, 29
Miscellaneous:
Choper, *The Establishment Clause and Aid to Parochial Schools*, 56 Cal. L. Rev. 260 ---- 4, 17
Equality of Educational Opportunity, United States Department of Health, Education and Welfare, Office of Education (the "Coleman Report") (1966) ---- 9
Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development, Part II. The Nonestablished Principle*, 81 Harv. L. Rev. 513 ---- 26, 27
Kurland, *Politics and the Constitution: Federal Aid to Parochial Schools*, 1 Land and Water L. Rev. 475 (1966) ---- 24
National Catholic Welfare Conference, *The Constitutionality of the Inclusion of Church-related Schools in Federal Aid to Education*, 50 Geo. L.J. 397 (1961) ---- 10
Pfeffer, *Church, State, and Freedom* (rev. ed. 1967) ---- 8, 24
Report of the National Advisory Commission on Civil Disorders, chap. 17, part II (1968) ---- 9

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OPINIONS BELOW

The opinions of the New York Court of Appeals (App. 63a) are reported at 20 N.Y. 2d 109, 281 N.Y.S. 2d 799, 228 N.E. 2d 791. The opinions of the Supreme Court of New York, Appellate Division, Third Department (App. 45a), are reported at 27 App. Div. 2d 69, 276 N.Y.S. 2d 234. The opinion of the Supreme Court of New York, Albany County (App. 29a), is reported at 51 Misc. 2d 297, 273 N.Y.S. 2d 239.

JURISDICTION

The judgment of the New York Court of Appeals (App. 61a) was entered on June 1, 1967. The notice of appeal was filed on August 17, 1967. Probable jurisdiction was noted on January 15, 1968 (389 U.S. 1031). The jurisdiction of this Court rests on 28 U.S.C. 1257(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides in relevant part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; * * *.

Section 701.3 of the New York Education Law is set forth at pp. 2–3 of Appellants' Brief.

QUESTION PRESENTED

Whether Section 701.3 of the New York Education Law, providing for the loan of secular text books to any student who attends grades seven through twelve of a public or private school that meets state standards and who individually requests such books, violates the First Amendment insofar as books may be loaned to children attending sectarian schools.

INTEREST OF THE UNITED STATES

It is the policy of the United States to improve the quality of education and to promote the maximum availability and utilization of educational resources.[1] In furtherance of these goals and after years of careful study and national debate, Congress enacted

[1] For example, under Title I of the Elementary and Secondary Education Act of 1965, 20 U.S.C. 241a *et seq.*, a wide variety

the Elementary and Secondary Education Act of 1965. Title II of this Act, 20 U.S.C. (Supp. II) 821 *et seq.*, authorizes grants to States which submit plans for the acquisition of library resources for the use of children and teachers in public and private elementary and secondary schools. 20 U.S.C. 823. Under this federal Act, just as under the New York statute at issue, publicly purchased textbooks are lent for use in sectarian schools. While the two statutes differ in organization and administration, so that the outcome of the present appeal will not necessarily answer similar questions arising under the federal Act, both statutes manifest the same legislative concern for general improvement of educational opportunities, and both involve similar constitutional values.

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of local programs to aid the education of children at all schools, including sectarian schools, are financed with federal funds.

The National Defense Education Act authorizes: grants to private colleges—including sectarian colleges—for low-interest student loans and fellowships (20 U.S.C. 421 *et seq.*, 464); loans to private schools, including sectarian schools, for acquisition of science, mathematics, and foreign language equipment (20 U.S.C. 441 *et seq.*); grants to State educational agencies for the testing of children in private schools, including sectarian schools (20 U.S.C. 481 *et seq.*); contracts with colleges for training programs to improve the qualifications of counselors and foreign language teachers at private schools, including sectarian schools (20 U.S.C. 481, 511); grants to colleges, including sectarian colleges, for the establishment of foreign language teaching centers (20 U.S.C. 511(a)).

The G.I. Bill of Rights provides for tuition grants to vet-

STATEMENT OF THE CASE

Appellants are two local boards of education in New York State which sued appellee State Commissioner of Education, seeking a determination that Section 701.3 of the New York Education Law is void and thus need not be followed by them. This statute authorizes the loan of textbooks to children enrolled in grades 7 through 12 of public or private schools complying with the compulsory education law, upon the individual request of the child. The textbooks which may be loaned are those "designated for use in any public, elementary or secondary schools of the state or * * * approved by any boards of education, trustees or other school authorities." The New York Court of Appeals construed the statute to require that the textbooks be "secular" and "nonreligious" (App. 67a). The State Education Department has specified that the texts must be "non-sectarian," thus excluding "denominational editions" and "those carrying the 'imprimatur' and 'nihil obstat' of a religious authority". See Opinion of Counsel No. 181 (Appellants' Brief, pp. 4a, 5a).

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erans, including those attending sectarian schools (38 U.S.C. 1601 *et seq.*).

The National School Lunch Act provides for grants to purchase lunches for children at private schools, including sectarian schools (42 U.S.C. 1751 *et seq.*).

The Higher Education Facilities Act of 1963 provides for grants and loans to universities, including sectarian universities, for construction of academic facilities (20 U.S.C. 701 *et seq.*).

See, generally, Choper, *The Establishment Clause and Aid to Parochial Schools*, 56 Cal. L. Rev. 260, 338–340.

The New York Court of Appeals, by a divided vote, upheld the validity of the statute.[2] The court found no incompatibility with the First Amendment,[3] because the statute is "completely neutral with respect to religion", making the textbooks available to children attending all types of schools (App. 67a). The court analogized the textbook program to the maintenance of public libraries (App. 66a). Moreover, the court determined that the

> purpose underlying section 701, found in the Legislature's own words (L. 1965, ch. 320, § 1 * * *), belies any interpretation other than that the statute is meant to bestow a public benefit upon all school children, regardless of

[2] In the state courts, one of the principal issues was the standing of the appellants. Standing was premised on the fact that the State Commissioner of Education may remove from office any school board member who fails to comply with any section of the Education Law, and may withhold public moneys from any school district whose school board fails to comply with any section of that Law. New York Education Law, Sections 306, 1706. The Appellate Division had directed dismissal of the complaint for want of standing (App. 45a), but a majority of the court of appeals concluded that in these circumstances local school boards may sue a State official (App. 64a, n. 1). Standing to litigate in this Court is, however, an independent federal question. *Doremus* v. *Board of Education*, 342 U.S. 429.

[3] The dissenting judges were of the view that Section 701.3 violated the New York State Constitution which has been construed to prohibit State programs permitted by the federal constitution. Compare *Judd* v. *Board of Education*, 278 N.Y. 200, with *Everson* v. *Board of Education*, 330 U.S. 1. The dissenters did not reach a firm conclusion concerning the status of this section under the First Amendment, observing that even if the State Constitution followed federal standards "it is by no means clear that the result would be different * * *" (App. 71a).

295-858—68——2

> their school affiliations. There can be no serious suggestion that the declaration of purpose by the Legislature was a verbal smoke screen designed to obscure a nefarious scheme to circumvent the New York State Constitution. * * * [App. 66a.]

Addressing itself to the effect of the program, the majority concluded that "any benefit accruing to those [parochial] schools is a collateral effect of the statute, and, therefore, cannot be properly classified as the giving of aid directly or indirectly" (App. 66a). And the practical effect of excluding private school children from the benefits of Section 701 was seen as likely to be a widening of "the gap between those children in deprived areas who attend parochial schools and those attending public schools in the same areas who receive the benefits of all the many and necessary programs backed by the massive resources of both State and Federal Governments" (App. 67a–68a).

This appeal followed.

SUMMARY OF ARGUMENT

New York has an undeniable interest in the quality of education provided children attending schools in New York, whether those schools be public or private, sectarian or non-sectarian. This interest has long been reflected in state statutes which impose minimal standards upon all schools operating in New York. The statute here in question—one which undertakes to lend textbooks of an entirely secular nature to schoolchildren in specified grades, regardless of the school they may attend—has the same basic justification:

That it is in furtherance of a valid, secular governmental purpose.

The Textbook Program does not give aid to sectarian institutions or sponsor the propagation of religion. Since the purpose and effect of furnishing the books are secular, the state is free to extend the benefits to all children; as *Everson* v. *Board of Education,* 330 U.S. 1, and subsequent decisions of this Court demonstrate, it is not required in such circumstances to exclude those children who choose to attend denominational schools. New York has recognized that the First Amendment effects a separation between church and state; but it has also correctly recognized that the Constitution demands no wall of separation between the state and children who are its citizens.

The appellants' invocation of the Free Exercise clause adds nothing to their claims under the Establishment Clause. No rights of the appellants to adhere to, or to refrain from, religious beliefs or practices are at stake in this case.

ARGUMENT

Under the tests that have been utilized by this Court to assure compliance with the Establishment Clause of the First Amendment, a governmental program designed to provide secular educational materials to all school-age children, including those who are students in sectarian schools, is a valid exercise of the power to make expenditures for the general welfare. At the outset, we emphasize that this case is far removed from any hypothetical appropriation to build a cathedral or synagogue, or even to construct a sectarian

school. The constitutional question here is only whether the government may make available on a nondiscriminatory basis certain learning materials which are devoid of sectarian content, when individual students request temporary access to them. No part of this statutory plan focuses on religion, or even on religiously affiliated institutions; instead, the program maintains a strict neutrality toward religious institutions, neither conferring benefits or advantages on them, nor denying children the opportunity to participate merely because they attend sectarian schools.

I. TEXTBOOK AID TO PRIVATE AS WELL AS PUBLIC SCHOOL PUPILS IS IN FURTHERANCE OF A VALID, SECULAR LEGISLATIVE PURPOSE

Ever since the establishment of a public school system in this country,[4] it has been recognized that the quality of education received by the youth of the nation is a matter of vital public concern.[5] In recent

[4] See *Everson* v. *Board of Education*, 330 U.S. 1, 23 (Jackson, J., dissenting); *McCollum* v. *Board of Education*, 333 U.S. 203, 214–215 (opinion of Frankfurter, J.).

[5] In 1835, Thaddeus Stevens opposed a proposal in the Pennsylvania legislature to repeal a law enacted the previous year permitting school districts to levy taxes for support of public schools. Stevens said, in a widely distributed speech:

"If an elective republic is to endure for any great length of time, every elector must have sufficient information, not only to accumulate wealth and take care of his pecuniary concerns, but to direct wisely the Legislature, the Ambassadors, and the Executive of the Nation; for some part of all these things, some agency in approving or disapproving of them, falls to every freeman."

Quoted in Pfeffer, *Church, State, and Freedom* (rev. ed., 1967) at 327–328.

years, this concern has intensified with the realization that inadequate education is a serious social problem,[6] and that inadequate education may result in a shortage of the skilled personnel required in today's economy. See National Defense Education Act of 1958, Section 101 ("Findings and Declaration of Policy"), 72 Stat. 1581. The New York Textbook Law reflects this concern. In its preamble, the Legislature declared:

> The security and welfare of the nation require the fullest development of the mental resources and skills of its youth. This calls for more adequate educational opportunities and increased efforts to educate more of the talent of our nation and requiring the correction of those imbalances in our educational programs which have led to an insufficient proportion of our population educated in the fields of science, mathematics, foreign languages and other non-sectarian subjects. * * * It is hereby declared to be the public policy of the state that the public welfare and safety require that the state and local communities give assistance to educational programs which are important to our national defense and the general welfare of the state.

Laws of New York 1965, ch. 320, section 1.

There can be no doubt that the Textbook Law thus was enacted for a legitimate, secular purpose. While, undeniably, the major focus of public concern for edu-

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[6] See *Report of the National Advisory Commission on Civil Disorders*, chap. 17, part II (1968); *Equality of Educational Opportunity*, United States Department of Health, Education, and Welfare, Office of Education (the "Coleman Report"), *passim* (1966).

cation is upon the public school system, this Court, in *Cochran* v. *Board of Education,* 281 U.S. 370, recognized that the public also has a legitimate interest in the quality of the education of those children who attend private schools, including sectarian schools. When the New York Textbook Law was amended in 1965 to require all school boards to lend textbooks and to include private school pupils in the program, over 20 percent of the pupils in grades 7–12 were enrolled in private schools,[7] and unquestionably a high proportion of these children attend sectarian schools.[8] A holding that the state must exclude these children would necessarily impair the state's ability to assure that all New York children are provided adequate educational opportunities.

In fact, far from ignoring the children attending sectarian and other private schools, the State of New York has long manifested its concern with the quality of their education. Under the state's compulsory education law, all minors between the ages of seven and sixteen are required to attend school full-time and, if not in attendance at a public school,

[7] The Legislative Memorandum of the State Department of Education on the 1965 amendment to the Textbook Law, which extended aid to private school pupils, stated that in grades 7–12 (the grades covered by the Law), there were in New York State approximately 1,352,000 pupils attending public schools and 315,000 attending private schools. McKinney's 1965 Session Laws at p. 2056.

[8] In the country as a whole over twelve percent of the student population attend Roman Catholic parochial schools. National Catholic Welfare Conference, *The Constitutionality of the Inclusion of Church-related Schools in Federal Aid to Education,* 50 Geo. L.J. 397, 443–444 (1961).

must be given instruction "at least substantially equivalent" to the instruction given in public schools. N.Y. Education Law, Sections 3204, 3205. Thus sectarian schools are bound by law to maintain a curriculum substantially equivalent to the course of study prescribed by statute for the first eight years of public school: "arithmetic, reading, spelling, writing, the English language, geography, United States history, civics, hygiene, physical training, the history of New York state and science." N.Y. Education Law, Section 3204.3a(1) (1967 Cum. Ann. Pocket Pt.).[9] The statute also requires that these subjects be taught in English. Education Law, Section 3204.2.

The 1965 amendment to the New York Textbook Law represents a considered judgment by the New York Legislature that the State's interest in the quality of education received by students attending private schools, including sectarian schools, is not sufficiently assured by the compulsory education law, and that the goal of improving educational opportunities for all students in the higher elementary and in the secondary grades will best be promoted by allowing pupils enrolled in sectarian schools the same access to secular textbooks that the State has undertaken to provide for their fellows attending public and other private schools. We submit that nothing in the Con-

[9] Additional requirements are laid down by the statute for courses beyond the first eight years, *e.g.*, the requirement of instruction in "American history including the principles of government proclaimed in the Declaration of Independence and established by the Constitution of the United States." N.Y. Education Law, Section 3204.3a(2).

stitution requires the courts to override this legislative judgment.

II. THE LEGISLATIVE DECISION TO LEND SECULAR TEXTBOOKS TO STUDENTS ATTENDING ALL ACCREDITED SCHOOLS, INCLUDING SECTARIAN SCHOOLS, PERMISSIBLY ACCOMMODATES VALID STATE OBJECTIVES WITH THE VALUES PROTECTED BY THE ESTABLISHMENT, FREE EXERCISE, AND EQUAL PROTECTION CLAUSES

This case involves the interplay of three constitutional provisions, each of which is designed to protect a distinct and unquestioned value. Yet in particular situations these provisions may overlap or point in different directions.[10] The Establishment Clause of the First Amendment seeks to preserve the dignity of both Church and State by excluding the State from the peculiar concerns of the Church; thus it ordains that government may not lend its power, prestige, or sanction to the advancement of any or all religion. The Free Exercise Clause complements this policy by requiring that the State scrupulously refrain from impairing the individual's conscientious judgment in matters of religion; therefore, government may not impede the practice of religion or penalize individuals because of their religious beliefs. Finally, the Constitution contains the broad injunction that no person shall be deprived of the equal protection of the laws, a guarantee which requires that the State's objectives

[10] See *Everson* v. *Board of Education*, 330 U.S. 1, 16; *Engel* v. *Vitale*, 370 U.S. 421, 430; *Abington School Dist.* v. *Schempp*, 374 U.S. 203, 222.

be pursued in a manner which avoids invidious discrimination."[11]

This Court has repeatedly recognized that the task of reconciling these constitutional commands is not exclusively a judicial concern and that the legislative branch plays an important role in the numerous determinations of policy which affect Church-State relations. It has found the solution to these delicate relationships by affording the legislature a measure of discretion and choice in those situations in which all of the legislative alternatives inevitably will result in some marginal loss of values underlying either the Establishment or Free Exercise clauses. Thus, this Court had held that the Constitution neither forbids nor requires the inclusion of parochial school children in the State's bus transportation program, *Everson* v. *Board of Education,* 330 U.S. 1, 16. For similar reasons, the Constitution neither forbids nor requires exemptions for Sabbatarians in those states which choose to have Sunday closing laws. *Braunfeld* v. *Brown,* 366 U.S. 599, 608–609 (opinion of Chief Justice Warren). See, also, *Zorach* v. *Clauson,* 343 U.S. 306, 314. For reasons which we elaborate, the New York textbook program does not transgress the constitutional limitations which circumscribe this area of legislative discretion.

[11] See *Everson* v. *Board of Education*, 330 U.S. 1, 4 n. 2; *McGowan* v. *Maryland*, 366 U.S. 420, 425–428; *Two Guys from Harrison-Allentown, Inc.* v. *McGinley*, 366 U.S. 582, 589–592; *Gallagher* v. *Crown Kosher Super Market, Inc.*, 366 U.S. 617, 622–624.

A. NEITHER THE PURPOSE NOR THE PRIMARY EFFECT OF THE NEW YORK TEXTBOOK LOAN STATUTE IS THE ADVANCEMENT OF RELIGION

As stated some twenty years ago in *Everson* v. *Board of Education,* 330 U.S. 1, the critical task in applying the Establishment Clause is to draw "the line between tax legislation which provides funds for the welfare of the general public and that which is designed to support institutions which teach religion." 330 U.S. at 14. Cf. *Braunfeld* v. *Brown,* 366 U.S. 599, 605. Of course, that formulation was not intended to provide a litmus test for separating constitutional from unconstitutional programs; it points toward the relevant considerations but does not determine how they are to be applied. In what has now become an increasingly lengthening line of cases, this Court has elaborated the criteria. It observed in *McGowan* v. *Maryland,* 366 U.S. 420, 443–444, that the public financing of transportation had been upheld in *Everson* because the "purpose and effect of the statute in question" was a general public welfare measure. See also *Torcaso* v. *Watkins,* 367 U.S. 488, 489. In the words of the Court's most recent Establishment decision (*Abington School Dist.* v. *Schempp,* 374 U.S. 203, 222):

> The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment

> Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion. * * *

In the present case, the court below examined the background as well as the structure of Section 701.3 and concluded that the "purpose" of the enactment was unquestionably the objective of conferring neutral secular benefits on all school children, and was not a subterfuge intended to avoid constitutional limitations (App. 66a, quoted *supra*, pp. 5–6). The court similarly determined that the statute's scope extends no further than the non-discriminatory loan of secular textbooks selected by public officials, to be made available only when individual students request them (App. 66a–67a). In this light, it was decided that there is no direct contribution to parochial schools, but only to the students who attend them;[12] and the court therefore assessed the operative effect of the program as not constituting even indirect aid to religion. "[A]ny benefit accruing to those schools is a collateral effect of the statute" and nothing more (App. 66a). Cf. *Everson* v. *Board of Education*, 330 U.S. 1, 16–18.

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[12] On this point it is important to correct the misimpression created by appellants' assertions that furnishing even secular textbooks enables "parochial schools to purchase religious books with the funds saved * * *" (see Appellants' Brief, pp. 7, 17). This statute, as written and as applied (see Opinion of Counsel No. 181, Appellants' Brief, p. 9a), provides for loans to pupils on their request, not to schools, and indeed it is uncontested (App. 14a) that before the passage of the statute the pupils attending sectarian schools in appellants' districts had to purchase all of their textbooks and did not have them furnished by their schools.

The court below has thus reached its decision in accordance with the guiding principles that this Court has enunciated. And of course the authoritative findings and declarations of the State's highest court, in thus assessing the purpose and effect of a state statute, are given great weight by this Court. See *McGowan* v. *Maryland*, 366 U.S. 420, 429; cf. *Reitman* v. *Mulkey*, 387 U.S. 369, 373–374, 381.

Nor are there any persuasive considerations undermining the validity of the state court's conclusions. There is no rational or record support for appellants' conclusory assertion that "a primary purpose of the Textbook Law to the extent it applies to parochial schools is to assist such schools in teaching religion." (Brief, pp. 24–25.) Not only is this contention directly contrary to the Legislature's express purpose and to the finding of purpose made by the court below; it is also belied by the face of the statute, which (1) authorizes book loans to students in all schools, without singling out parochial school children for favored treatment; (2) requires that the texts be of a wholly secular nature; and (3) requires that they be made available not to the school but to the individual student who makes a personal request. For reasons set forth in Point I, *supra*, it is too late in our constitutional development to argue in the face of such circumstances that, as a matter of law, inclusion of parochial school children in such a program is inconsistent with a valid secular purpose.[13]

[13] We note that in *Abington School Dist.* v. *Schempp*, 374 U.S. 203, 225, the Court specifically declared that in certain circumstances even the study of the Bible or of religion in a

Appellants also assert that there "is no such thing as secular education in a sectarian elementary or secondary school"—that the "whole curriculum is permeated by religion" (Brief p. 16). Even if this sweeping statement could be taken as an accurate description of the curricula of all sectarian schools of all denominations,[13a] it fails to sustain the appellants' contention. It overlooks the crucial fact that the textbooks themselves, which are all that the State provides, do not reflect a religious point of view. Of course, a particular recipient of a secular textbook, including a public school child, may color his reading and interpretation of the book with his religious outlook. On the other hand, a non-Catholic child who attends a parochial school for non-religious reasons may reject that Church's teachings about his secular textbooks. Yet surely the State, in pursuing its objective of providing all school children with secular textbooks, need not be hobbled with inquiries about individual children's religious beliefs and receptivity to religious interpretations. In fact, such inquiries would themselves raise serious constitutional problems. See, *e.g.*, *Kreshik* v. *St. Nicholas Cathedral,* 363 U.S. 190; *Torcaso* v. *Watkins,* 367 U.S. 488; *Kedroff* v. *St. Nicholas Cathedral,* 344 U.S. 94; *Watson* v. *Jones,* 13 Wall. 679. It is sufficient that the State has taken measures to assure that the textbooks it furnishes to the children are entirely secular in con-

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public school could constitute "part of a secular program of education" consistent with the First Amendment. This would seem to preclude appellants' suggestion that lending a *secular* textbook to any child in any school affiliated with any denomination must inevitably be intended to "assist * * * teaching religion."

[13a] See, generally, Choper, *supra*, n. 1, at 291–303.

tent and that it has refrained from sponsoring or financing any religious interpretation of them that may occur.

This Court has made it clear that legislation designed to achieve a valid secular purpose does not run afoul of the Establishment Clause because an incidental effect [14] of the legislation may be to facilitate the practice of religion. Sunday closing laws are valid even though they undoubtedly have a religious origin and may benefit churches which hold services on Sunday. *McGowan* v. *Maryland,* 366 U.S. 420. Churches unquestionably benefit from governmental services designed to promote the general welfare—such as police and fire protection, sewage disposal, and public maintenance of highways and sidewalks. See *Everson* v. *Board of Education,* 330 U.S. 1, 17–18. Few would question the validity of the school lunch program, although the lunches may be served on school property. See National School Lunch Act, 42 U.S.C. 1751 *et seq.* And, of course, this Court has sustained the inclusion of sectarian school children in a school busing program, *Everson* v. *Board of Education, supra.* As recognized in *Everson,* such general programs can in a sense be said to aid sectarian schools, since without them it would be "more difficult for the schools to operate." 330 U.S. at 18. Yet, they are not, for that reason, impermissible.

It has been suggested, however, that "welfare" measures that cover sectarian schools are permis-

[14] The court below concluded that any benefit to sectarian schools resulting from this program is merely a "collateral effect of the statute" (App. 66a).

sible, while "educational" measures are not. We suggest that such an attempt to attach different labels to state programs is not a meaningful approach to constitutional adjudication. Surely the State's concern with the quality of education its citizens receive is not different in source or substance from its concern with their health and safety or other aspects of their welfare. The philosophy that the State's only legitimate functions are to provide police and fire protection and maintain roads has long been discredited. Nor is there a practical distinction between "welfare" and "educational" aid. As noted in *Everson*, sectarian schools might well be unable to operate if they did not receive such ordinary governmental services as police and fire protection, sewage disposal, the maintenance of public highways and sidewalks, and school busing. 330 U.S. at 17–18.

A geographical distinction has also been suggested: aid which does not cross the property line of the sectarian school is permissible, while aid which crosses that line is not (Appellants' Brief, p. 22). This purported test is plainly inadequate since it would strike down the provision of unquestionably legitimate programs like school lunches and medical care, and would preclude police, fire and sanitation service on sectarian school property. The "property line" test is also unresponsive to the problems to which the First Amendment was addressed. Clearly aid to religion may result from governmental activity off, as well as on, church-owned premises. See, *e.g.*, *Torcaso* v. *Watkins*, *supra*. As this Court has said, what is important

is the purpose and effect of such aid, not where it takes place.

Of course, the Court need not in this case concern itself with the metes and bounds marking off the areas in which the government may perform services for religious institutions from those where it may not. Both in form and in fact, the New York program before the Court does not involve aid to sectarian schools in any proper usage of that concept. The statute merely provides for across-the-board loans of secular textbooks to any children in the designated grades who request them. The record shows that before this program was instituted it was the pupils in parochial schools (through their parents) who bore the expense of purchasing texts (App. 14a). It is therefore irrelevant to speculate about how the funding of secular textbooks might allow the sectarian school to divert its resources *pro tanto* into unmistakably religious functions. Apart from the point that the same objection would as a matter of logic forbid public financing of trash collection from parochial schools—which also "frees" their assets for other purposes—in this case it is the parents whose financial posture is affected. Thus, any nexus between the State's decision to save parents the cost of secular textbooks for their children and the "advance[ment of] religion" is so attenuated that it cannot be said that promoting religion is either "the" primary effect or "a" primary effect of this program (see Appellants' Brief, p. 26). See, also, McKinney's 1965 Session Laws, p. 2057.

Appellants also argue that the "child's request is a fiction" and that the whole program "is nothing but

a transparent attempt to do indirectly what cannot be done directly" (Brief, p. 19). Again, they apparently overlook the fact that the expenses saved are those of the parents, not of the school. They also assume the answer to questions not posed by this case: whether in any circumstances the State may bear the cost of supplementing or of supplanting the expenditures of a sectarian school. An even more basic objection is that their premise—that the child's request is a sham—is not supported by their own references. The Opinion of Counsel which they cite explicitly requires that each student must make a request for any books he wishes to use and must address it to the local board of education (Appellants' Brief, p. 9a). The school is given the option of either forwarding all individual requests collectively to the board of education *or* submitting a summary while it "keep[s] such requests on file * * *" (*ibid.*). Furthermore, appellants incorrectly suggest that the local board's duty to avoid duplicating existing supplies extends only to books owned by sectarian schools (Brief, p. 19); in fact the board is obliged to avoid purchasing books that are presently available in any public or non-public school (Brief, pp. 11a–12a). Accordingly, we perceive no basis for discrediting this program as not genuinely involving the neutral and even-handed administration of a measure designed to provide direct benefits to the children involved.

An apt analogy is the public library system, which the court below correctly viewed as a constitutionally relevant norm (App. 66a). No one suggests that allowing students from parochial schools to use public li-

braries contravenes the Establishment Clause. The New York textbook program is essentially indistinguishable from a lending library; it makes available to any individuals who so request secular books selected by a public agency. As the Court of Appeals pointed out, sectarian school teachers (like their counterparts in the public schools) frequently give assignments requiring the children to utilize public library books.[15] And surely sectarian school children (or teachers) borrowing public library books are not prohibited by the Constitution from bringing these books onto the school property, even if a religiously oriented commentary on the book will there be introduced. Of course, public library books are generally loaned for a briefer period than textbooks under the Textbook Law. But we fail to perceive why the latter program should for that reason be regarded as having as its "primary effect" the unconstitutional advancement of religion by the state.[16] Public library books, no less than the books loaned under the present statute, may be used on sectarian school property in connection with classes in which the teaching may be colored by a religious viewpoint. The only significant difference is that the textbook program is confined to books with

[15] Indeed, public libraries may relieve sectarian schools of the expense of maintaining their own libraries.

[16] Public libraries are, of course, open to all, while the Textbook Law authorizes loans only to children attending schools complying with the compulsory education law. However, this hardly has constitutional significance, since the statutory plan focuses on the education of school children, rather than on the general public enlightenment which is the concern of the public library system.

a secular content, while public libraries are not so confined—a distinction which hardly aids appellants' claim.

B. A CONSIDERATION OF THE ALTERNATIVES TO NEW YORK'S PROGRAM CONFIRMS THE CONCLUSION THAT THE STATE HAS MADE A REASONABLE AND CONSTITUTIONALLY PERMISSIBLE CHOICE

When the New York Legislature decided to extend textbook aid to private schools, it faced a dilemma. On the one hand, if sectarian school pupils were included, it faced the constitutional contentions raised in this suit. On the other hand, if these pupils were excluded, it faced the charge of discriminating against children on the basis of religion in the administration of a general aid program.

There are two basic alternatives to a program of the present kind. The Legislature might omit children attending sectarian schools from all of its general programs designed to improve the quality of elementary and secondary education in the State. Or it might seek some other means of improving the education of these children. There are certainly reasonable grounds for a legislative conclusion that these approaches represent less desirable means of improving the education of school children. Moreover, the alternatives would raise practical and legal problems of at least comparable magnitude.[17] A fact of educa-

[17] Once the State decides that it cannot ignore the education of sectarian school pupils, it may conclude that no alternatives to the textbook aid program will be as effective at a comparable cost. Any program for holding classes in secular subjects for sectarian school pupils on public school property after school hours or during vacations would doubtless involve attendance

tional life in our society is that significant proportions of students—numbering in the millions—are exercising what this Court in *Pierce* v. *Society of Sisters,* 268 U.S. 510, unanimously held is a constitutional right to attend a private, including a private sectarian, school. See *Griswold* v. *Connecticut,* 381 U.S. 479, 482. As the Court cautioned in *Everson,* a State may not exclude members of religious groups, *"because of their faith, or lack of it,* from receiving the benefits of public welfare legislation," lest efforts to avoid establishing religion "inadvertently prohibit [the State] from extending its general state law benefits to all its citizens without regard to their religious belief." 330 U.S. at 16. (Emphasis in original.) See, also, *McGowan* v. *Maryland,* 366 U.S. 420, 445; cf. *Thorpe* v. *Housing Authority,* 386 U.S.

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problems, and the time which could be devoted to these classes would necessarily be limited. Shared time or dual enrollment programs—under which sectarian school pupils spend part of their day enrolled in the local public school—are another possible alternative. See Pfeffer, *Church, State, and Freedom,* 571–579 (rev. ed. 1967). These programs, too, have been attacked as unconstitutional. Kurland, *Politics and the Constitution: Federal Aid to Parochial Schools,* 1 Land and Water L. Rev. 475, 494 (1966). Moreover, public schools may already be burdened to the point where they could not accommodate the additional pupils, even for a part-time attendance; and to provide the additional teachers and building space necessary to accommodate an influx of part-time students from sectarian schools would undoubtedly be considerably more expensive than the provision of textbooks.

In short, a program which reaches the child in the school at which he spends most of his day may surely be regarded as the most effective and efficient way to improve the quality of his secular education.

670, 678–679 (Douglas, J., concurring).[18] Of course, the Court in *Everson* pointed out that the State might limit bus transportation to students in the Sate's schools; nonetheless, the caveat illustrates that when the determinations in this area are affected by competing First Amendment considerations, the legislature's exercise of its peculiar capacity to consider and weigh a whole panoply of factors should be respected in the absence of a clear violation of its duty of neutrality. Viewed in the light of the alternatives available to the legislature, the New York textbook law is a reasonably tailored, carefully balanced, and neutral program wholly compatible with the objectives of the First Amendment.

The practical consequences of excluding sectarian school children from all government programs of aid to education are obvious. Given such a policy of exclusion, many parents might prove unwilling or unable to maintain their children in parochial or sectarian schools. This, in turn, would shift new and heavy burdens to the State. It has been estimated that non-

[18] In *Zorach* v. *Clauson*, 343 U.S. 306, 312–314, in sustaining the validity of released-time programs, the Court explained: "When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. * * * [W]e find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the scope of religious influence." The New York program before the Court in this case falls short even of the "encouragement" which *Zorach* recognized might in some situations be permissible, since the Textbook Loan law merely allows children attending parochial schools to maintain a parity with their peers in public schools.

public schools in New York City alone save the taxpayers almost $500 million annually. Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development, Part II. The Nonestablishment Principle,* 81 Harv. L. Rev. 513, 573 n. 176.

Also circumscribing any legislative decision in this area are the substantial constitutional problems that would have to be faced if sectarian school pupils were to be excluded from all programs of government aid to education. Parents have a constitutional right to choose to send their children to sectarian rather than public schools. *Pierce* v. *Society of Sisters,* 268 U.S. 510, 535. For many parents, this course is a matter of religious obligation,[19] as fully entitled to First Amendment protection as the religious obligations accorded protection in *Murdock* v. *Pennsylvania,* 319 U.S. 105, and *Sherbert* v. *Verner,* 374 U.S. 398. And although we recognize that the State is not required to subsidize the exercise of First Amendment rights, neither may it, absent some compelling reason, disqualify a person from receipt of generally available benefits because of his performance of a religious obligation. *Sherbert* v. *Verner, supra; Everson* v. *Board of Education, supra,* 330 U.S. at 16. Surely the Legislature may validly conclude that it will not discourage the exercise of a First Amendment right by excluding students who are sent to sectarian schools from access

[19] *Everson* v. *Board of Education,* 330 U.S. 1, 22–23 (Jackson, J., dissenting); Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development, Part II. The Nonestablishment Principle,* 81 Harv. L. Rev. 513, 573 n. 178.

to the same books available to all other public and private school pupils.

If a state policy of exclusion of children in sectarian schools from government aid programs were to induce children who would prefer a sectarian education to attend public schools instead, problems of Church-State friction might well increase. The churches which have felt strongly enough about their role in education to maintain a sectarian school system are not likely to lose this concern merely because their adherents attend public schools in larger numbers. Instead, these churches might direct more of their energies to influencing the curriculum in the public schools. See *Epperson* v. *State*, 242 Ark. 922, 416 S.W. 2d 322 (1967), probable jurisdiction noted, No. 749, this Term, March 4, 1968; *Giannella, op. cit. supra*, 81 Harv. L. Rev. at 567. Surely, legislators might reasonably conclude that the problems of Church-State friction and of religious divisiveness in the community would be aggravated rather than diminished by excluding children in sectarian schools from aid programs open to other children.

There are, of course, constitutional limits on the Legislature's range of choice. The problem of accommodating the interests involved is a delicate one. We emphasize, as we did at the outset, that this is a case which falls well within the limits. We stress again that the textbooks loaned are non-sectarian; that any benefit redounds to the advantage of individual parents and students; that sectarian students merely participate in a neutral program for all students; and that there is no basis for suggesting that the loan of secular

textbooks has converted sectarian schools into quasi-public institutions, identifying the state with sectarian doctrines. What other types of aid-to-education might transgress constitutional limits is not, of course, a question that must be decided in this case.

III. NO QUESTION OF VIOLATION OF THE FREE EXERCISE CLAUSE IS RAISED BY THIS CASE

Although appellants persist in their contention that the New York textbook loan program violates the Free Exercise Clause of the First Amendment, we submit that this attempt to inject an alternative constitutional challenge is groundless. See *Zorach* v. *Clauson*, 343 U.S. 306, 311. A claim that the Free Exercise Clause has been violated depends upon a showing of direct governmental pressure, *Engel* v. *Vitale*, 370 U.S. 421, 430, which coerces a person to believe or disbelieve in a particular religion or in religion in general, *Torcaso* v. *Watkins*, 367 U.S. 488, 495. As the Court explained in *Abington School Dist.* v. *Schempp*, 374 U.S. 203, 223, "it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion. * * * [A] violation of the Free Exercise Clause is predicated on coercion * * *." Appellants' only explanation of their Free Exercise Clause claim (Brief, pp. 31–37) is confined to a reiteration of their arguments made in connection with their charge of Establishment.[20] It

[20] The contention that the New York statute "promotes a union of Church and State" (Brief, p. 36) is the classic formulation of an Establishment claim, and poses no separate Free Exercise question.

is evident that no one is being coerced in the practice of his faith by the textbook loan program. To the extent that they argue that the recipients of aid are in danger of being restricted in their religious liberty by political controls which follow public assistance (Brief, p. 35), appellants fail to explain how any student or parent is compelled to make an "individual request" for a textbook loan, or why no recipients of loaned textbooks, or members of the class who may seek such loans, have joined the attack upon the program.

Appellants, moreover, would lack the standing necessary to assert even a colorable Free Exercise claim. They are two local boards of education, and there could be no assertion that these boards or their members, acting in their official capacity, have any right to free exercise of religion which is violated by the Textbook Law. As members, the individuals' sole interest in this textbook program is that they, as public officials, must administer it. The fact that they are obliged to expend public moneys in ways which they consider to be unconstitutional does not constitute a violation of their right to practice or not to practice religion.

Appellants argue, however, that insofar as the Textbook Law forces taxpayers to contribute to an establishment of religion to which they do not subscribe, it thereby violates the Free Exercise Clause. Apart from the fact that this argument is merely a reiteration of the Establishment contention, appellants themselves do not sue as taxpayers, and they have no standing to assert the "Free Exercise" rights of

others. *McGowan* v. *Maryland*, 366 U.S. 420, 429–430. There is no suggestion of any weighty countervailing considerations that might justify an exception permitting appellants to raise the constitutional rights of others; nor is it contended that any individuals who feel their religious freedom is endangered will be unable to protect their rights for themselves.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals of New York should be affirmed.

Respectfully submitted.

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APRIL 1968.

U.S. GOVERNMENT PRINTING OFFICE: 1968